Analysis of merger regulation and economical criteria

Abstract:

The United States of America has been the cradle of merger regulation. During the last century, the application of rules connected with merger assessment was evolving in connection with the then-prevalent economic schools (for example the University of Chicago, etc.) and in connection with the amount of regulation of American economy during certain periods. The Courts make decisions whether or not a merger leads or does not to a significant lessening of competition, whereas the petitioners can be persons affected by relevant merger, states or federal antitrust Agencies (FTC or DOJ). The notifications of the merging parties are being filed with the above Federal Antitrust Agencies according to the Hart-Scott-Rodino Antitrust Improvements Act.

There are two possible anticompetitive effects of mergers – unilateral effects and coordinated effects. Both effects complement each other. These effects can be prevented by efficiency gains of the merged entity.

The merger assessment in the European Union or the Czech Republic is relatively new in comparison with the US. In contrast to the US, the concentrations in the EU and the Czech Republic are cleared by the Antitrust Agencies (namely the European Commission or Czech Competition Office). The decisions of these Agencies can be appealed against to the Courts, whereas the Courts are limited only to review of legality of the contested decision of an Antitrust Agency, the Courts cannot decide the merits of the contested decision.

However, the merging firms often abandon or restructure the transaction after it is challenged by the Antitrust Agencies. In many cases, there are no Court proceedings and the last stage of merger assessment is the assessment by the Antitrust Agencies.

An important difference between the merger regulation in the US and the EU relates to the definition of criteria making the notification of mergers necessary. The notification criteria in the US are set many times lower than the notification criteria in the EU, which results in many more notifications in the US as compared to the EU (approximately six times more).

Until 2004, the substantive test in European Union was very unlike the substantive test in the US. The concentration could be prohibited only on the condition that the concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded in the common market. This substantive test, therefore, did not enable blocking concentrations, when there was no dominant position created or strengthened. Moreover, the EU was treating the efficiency gains defense very restrictively and such a defense was not generally accepted.

In 2004, a new merger regulation was enacted and became effective in the EU. In relation to the substantive test, there is no significant difference between the compared legislations. The substantive test that is used by the European Commission (and adopted in a decisive regard by the Czech Competition Office) had been inspired by the merger assessment in the US. European Authorities were inspired by the adoption of new merger regulation and guidelines of the commission on assessment of mergers by the unilateral effects and coordinated effects analysis detailed in the US merger horizontal guidelines. Moreover, the organization of the Directorate General of Antitrust in the EU has been changed and a special economic department dealing with assessment of effects of mergers was founded.

In 2010, the US Antitrust Agencies issued new Horizontal Merger Guidelines that broadened significantly the enumeration of methods and actions used by the US Antitrust Agencies by assessment of effects of mergers. This change is an evolutionary change; no revolutionary change has been made.

However, some minor differences in the process of assessment of effects of mergers persist. Those differences relate mostly to the definition of the relevant market; moreover, a relevant market must not be defined by the US Antitrust Agencies in all cases. Some minor differences might be found in the determination of some analytical tools and methods and their importance in

merger assessment. While there is an emphasis placed on the diversion ratio in the US, the European Union and Czech Authorities analyze mainly rates of substitution and elasticity.

Even today it can be argued that the US merger assessment is more evolved and sound in the US than in the European Union or the Czech Republic. In the US there is a broader and more specialized discussion related to the effects of mergers and their assessment – for example, this even led to bald move by the Antitrust Agencies, in which they did not define relevant market. From the economical point of view is this process justifiable; however, determination of a relevant market might add more persuasiveness to perspective complaints of US Antitrust Agencies.

The legislation of the Czech Republic, namely stipulations of the Antitrust Act and implementing regulations are inspired in a significant way by the legislation of merger regulation in the European Union. The same conclusion can be made with respect to the case law of the Czech Competition Office and its notifications that inform merging parties about the process of assessment of the effects of concentrations.

There can be some imperfections identified in the Czech Antitrust Act. One of the imperfections are extreme formalistic definitions of individual legal terms (for example the term concentration of competitors, competitor). The terms are applied relatively extensively. respected commentaries and law scholars agree that the accuracy of such extensive application is doubtful. The legislation of the Czech Republic differs from the EU legislation in some further less important aspects that are set out in more detail in the thesis (for example there is no Luxembourg exemption applied in the Czech Republic and the change of quality of control is applied somewhat differently).